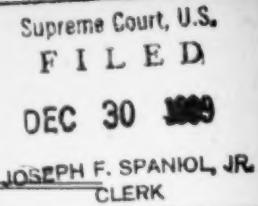


No. 89-844



In The
Supreme Court of the United States
October Term, 1989

MICHIGAN BELL TELEPHONE CO.,

Petitioner,

v.

BARBARA CLEARY,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

GARY R. BLUMBERG
Counsel of Record

GITTLEMAN, PASKEL, TASHMAN
& BLUMBERG, P.C.
24472 Northwestern Highway
Southfield, Michigan 48075
(313) 353-7750



QUESTION PRESENTED

- I. WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. SECTION 185, PREEMPTS A STATE-LAW HANDICAP DISCRIMINATION CLAIM, THE RESOLUTION OF WHICH DOES NOT REQUIRE INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT?

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	
I. WHETHER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. SECTION 185 PREEMPTS A STATE-LAW HANDICAP DISCRIMINATION CLAIM, THE RESOLUTION OF WHICH DOES NOT REQUIRE INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT	1
REASON FOR DENYING THE PETITION.....	4
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Allis-Chalmers Corporation vs. Lueck</i> , 471 U.S. 202 (1985)	2, 4
<i>Lingle vs. Norge Div of Magic Chef</i> , 486 U.S. ____ 108 S.Ct. 1877 (1988).....	3, 4, 5, 7
<i>Smolarek vs. Chrysler Corporation</i> , 879 F.2d 1326 (Sixth Cir 1989)	3, 7



COUNTER-STATEMENT

On August 14, 1987, Respondent (Plaintiff), Barbara Cleary, filed a Complaint against Petitioner (Defendant), Michigan Bell Telephone Company, in Michigan's Wayne County Circuit Court alleging discrimination under Michigan's Handicappers Civil Rights Act (HCRA).

On June 17, 1984, Cleary commenced employment with Michigan Bell. Thereafter, and at all times materially relevant to this action, she performed her duties as maintenance administrator in a manner which met or exceeded the Defendant's legitimate business expectations. On August 4, 1985, Cleary suffered non-work related injuries as a result of a motor vehicle accident temporarily disabling her from her employment and for which Michigan Bell authorized a sickness disability leave of absence. On August 6, 1986 Cleary's family physician released her to return to work at her place of employment with restrictions which would not have interfered with her ability to perform her job. Michigan Bell's company doctor examined Cleary on August 8, 1986 and released her to return to her employment with the restrictions as outlined by her personal physician.

After the company medical exam, Cleary contacted her supervisor and was told by a second line supervisor, Jerome Malinowski, that he could not let her come back to work in his department because she required the use of canes, and he would not allow anyone to work in his department with canes. Malinowski terminated Cleary allegedly because of the medical restrictions. He neither knew nor understood the parameters of the medical restrictions, there were no special physical requirements

for Cleary's job of maintenance administrator, and the medical restrictions would not have prevented Ms. Cleary from performing her job as a maintenance administrator.

In her Complaint, Cleary alleged that Michigan Bell, in refusing to allow her to return to her position as maintenance administrator, violated its duty under the HCRA by wrongfully terminating her because of physical characteristics and/or handicaps which were totally unrelated to her ability to perform her duties as maintenance administrator.

On August 27, 1986, Cleary's union, the Communication Workers of America, (AFL-CIO), filed a grievance claiming that Michigan Bell unfairly terminated her because of her handicap. The union's charge was that there was no effort made to find her another job. The grievance proceeded through arbitration. The only issue arbitrated was whether the company improperly terminated Cleary. The arbitrator ultimately ruled that Cleary was improperly terminated. While Cleary has been reinstated to her former position, she has not received back pay nor has she received damages which are compensable under Section 1606 of the Michigan's HCRA.

The District Court ruled that under the case of *Allis-Chalmers Corporation vs. Lueck*, 471 U.S. 202 (1985), the federal law had preempted the Michigan state statute prohibiting handicapped discrimination and granted Defendant's Motion for Summary Judgment. On appeal to the Sixth Circuit, the Sixth Circuit panel in a per curiam opinion held that Cleary's claims under the HCRA are not preempted by Section 301 because no

interpretation of the Collective Bargaining Agreement (CBA) is required in order to resolve the HCRA claim. Thus, Cleary's HCRA claim is "independent" of her rights under the CBA and is not preempted by Section 301.

The only issue on appeal to the Sixth Circuit was whether Cleary's claim under the HCRA is preempted by Section 301 of the LMRA. The Sixth Circuit panel found that the issue was resolved by its en banc decision in *Smolarek vs. Chrysler Corporation*, 879 F.2d 1326 (Sixth Cir 1989), in which it held that claims under the Michigan HCRA are not preempted by Section 301 as they do not necessitate interpretation of the CBA.

In *Smolarek*, the Plaintiff claimed that his employer violated the HCRA by refusing to return him to his former position or another position consistent with his medical restrictions and maintained him instead on a disability layoff indefinitely. The facts in the instant case are even stronger than those contained in *Smolarek*. In this case, Plaintiff has not claimed any right to reinstatement under the CBA. On the contrary, Cleary was released to return to work with restrictions that would not have affected her ability to perform her job and was prohibited from returning to work and terminated because of the restrictions that were unrelated to her ability to perform her job.

In *Smolarek*, a Petition for Certiorari is now pending. While Michigan Bell has taken great pains to distinguish this case from *Smolarek*, the fact is that the decision in *Smolarek* controls whether this case is preempted by Section 301. The Sixth Circuit, relying on *Lingle vs. Norge*

Division of Magic Chef, 486 U.S. ___, 108 S.Ct. 1877 (1988), properly held that a state law of Michigan HCRA claim is not preempted by Section 301.

REASON FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied for the reason that:

- I. The instant case is consistent with this Court's prior decisions.
- I. THE INSTANT CASE IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

In *Allis-Chalmers Corporation vs. Lueck*, 471 U.S. 202 (1985), this Court held that an employee's state-law tort action is only subject to preemption by Section 301 if it is substantially dependent on analysis of the terms of the CBA. Cleary's state-law claim of handicap discrimination, as well as the defense to that claim, is not dependent on, nor does it require analysis of the CBA.

In *Lingle vs. Norge Division of Magic Chef*, 486 U.S. Ct. 1877, 100 L.Ed. 2nd 410 (1988), a union employee sued her employer, alleging she was discharged in retaliation for filing a worker's compensation claim. In a separate proceeding, Plaintiff also took advantage of the CBA grievance procedure, and won reinstatement with back pay at arbitration.

In *Lingle*, this Court permitted the unionized employee to use the CBA grievance procedure and at the same time proceed to enforce her rights under state law. In a unanimous opinion holding that the state claim was

not preempted by Section 301, this Court noted that the issues raised by the state law claim did not require interpretation of the CBA:

To show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge, and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the act or to interfere with his exercise of those rights. Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employee. Neither of the elements require a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for Section 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." (citations and footnote omitted).

As in *Lingle*, resolution of the state law claim for handicap discrimination involves purely factual questions without any need for interpretation of any CBA provisions.

The HCRA creates a statutory cause of action for violation of certain enumerated employer prohibited practices. Specifically, the statute prohibits employers from discharging employees because of a handicap that is

unrelated to the individual's ability to perform the duties of a particular job or position. The Complaint sought damages for Michigan Bell's wrongful termination of Cleary because of physical characteristics and/or handicaps unrelated to her ability to perform her job in violation of the HCRA. The Sixth Circuit correctly held that resolution of Cleary's state law claim does not require interpretation of the CBA. The issues in this case are purely factual and concern simply whether Cleary was terminated from her position as maintenance administrator because of physical characteristics and/or handicaps unrelated to her ability to perform her position.

The proofs necessary to establish prima facie liability under HCRA are (1) that Michigan Bell took adverse employment action against Cleary, and (2) that the actions were motivated because of her physical characteristics and/or handicaps.

Since resolution of Cleary's state law HCRA claim does not require interpretation of the CBA, the Sixth Circuit's decision that it is not preempted by Section 301 is fully consistent with prior decisions of this Court. Federal preemption does not apply so long as the state claim can be resolved without interpretation of the CBA. *Lingle*, 108 S.Ct. at 1885.

Even though the CBA is implicated in the Complaint, no interpretation of the CBA is required to resolve Cleary's HCRA claim. This Court noted in *Lingle* that "The mere fact that a broad contractual protection against discriminatory - or retaliatory - discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state

law violation dependent upon the terms of the private contract." *Lingle*, 108 S.Ct. at 1885.

Thus, it is clear that claims under the Michigan HCRA which do not necessitate interpretation of a CBA are not preempted by Section 301. The Sixth Circuit in *Smolarek* relied upon the guidelines set forth by this Court in *Lingle*. Cleary's state law remedy under the Michigan HCRA is "independent" in the sense that matters for Section 301 preemption, i.e. resolution of her claim does not require construing the CBA.

The Sixth Circuit correctly applied the tests for pre-emption established by this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GARY R. BLUMBERG (P29820)
Counsel of Record

GITTLEMAN, PASKEL, TASHMAN
& BLUMBERG, P.C. -
24472 Northwestern Highway
Southfield, Michigan 48075
(313) 353-7750

December 1989